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No. 89-1002

In the Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD L. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner preserved his contention that the government violated his Fifth Amendment privilege against compulsory self-incrimination by obtaining documents and information from a former attorney that were allegedly subject to the attorney-client privilege.

2. Whether the court of appeals erred when it authorized the district court, on remand, to conduct an *in camera* review of documents provided to the government by petitioner's former attorney and the transcript of the attorney's grand jury testimony.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 879 F.2d 1509. The memorandum opinion and order of the district court (Pet. App. 21-25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1989. A petition for rehearing was denied on October 13, 1989 (Pet. App. 19). The petition for a writ of certiorari was filed on December 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted on two counts of bankruptcy fraud, in violation of 18 U.S.C. 152. He was sentenced to concurrent three-year terms of probation, conditioned on service of a brief term of imprisonment and community service, and he was ordered to pay a fine of $25,000.

1. On December 20, 1984, petitioner and his wife filed a joint bankruptcy petition in the United States Bankruptcy Court for the Southern District of Indiana. Petitioner was represented in the bankruptcy proceeding by Mark Center, a partner in the Indianapolis law firm of Bamberger & Feibleman. In May of 1985, petitioner and his wife were discharged from bankruptcy after the trustee concluded that there were no assets available for distribution to their unsecured creditors. Pet. App. 2; Gov't C.A. Br. 5.

Two years later, Center was convicted of bankruptcy fraud in an unrelated matter. After his conviction, Center informed the government that fraud had also been committed in connection with petitioner's bankruptcy, and he agreed to assist the government in its investigation of the alleged fraud. Acting on his own volition, Center went to the offices of Bamberger & Feibleman and made copies of documents from petitioner's file, which he then turned over to the government.[1] Center later testified before the grand jury that

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[1] In the district court, the government submitted an affidavit by an Assistant United States Attorney stating that "Mr. Center visited his former firm to view the files at his own, and not the Government's, instance" and that "the Government did not instruct or request that Mr. Center ever remove documents from

was investigating petitioner's bankruptcy, but did not testify at petitioner's trial. None of the documents that he provided to the government was introduced into evidence at the trial. Pet. App. 2-3; Gov't C.A. Br. 41-42.

2. Petitioner and his wife were indicted on two counts of bankruptcy fraud. Petitioner moved to dismiss the indictment or, in the alternative, to suppress all evidence directly or indirectly derived from Center's disclosures to the government. Pet. App. 26-46. The district court denied the motion. *Id.* at 21-25.

The jury returned guilty verdicts against petitioner and his wife on both counts of the indictment. The evidence at trial showed that their bankruptcy petition included a sham third mortgage on their home and omitted several assets, including three life insurance policies, stock in a local bank, and a $10,000 debt owed to petitioner. Gov't C.A. Br. 7-17.

3. The court of appeals reversed petitioner's wife's conviction, finding that there was insufficient evidence to establish that she was aware of the contents of the bankruptcy petition. The court rejected petitioner's contentions that the evidence was insufficient to sustain his conviction and that the indictment was duplicitous, and it remanded for further proceedings on petitioner's contention that he was entitled to an evidentiary hearing to develop his claim that Center had violated petitioner's attorney-client privilege. Pet. App. 1-9.

With respect to the privilege claim, the court acknowledged that the government had not introduced any privileged documents into evidence, but it noted that documents obtained from Center might have

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files relating to [petitioner]." Gov't C.A. Br. App. 4.

provided leads to evidence that was introduced. The court identified three possible contentions that might arise from the derivative use of such documents.

First, the court suggested, if any of the leads resulted from statements by petitioner to Center, disclosure of those statements might violate petitioner's Fifth Amendment privilege against compulsory self-incrimination. Two members of the panel concluded, however, that petitioner had waived any such claim by referring to the privilege only in "a passing reference in a footnote." Pet. App. 7. Judge Will, dissenting on this point, would have held that petitioner had preserved the self-incrimination claim. *Id.* at 12-13.

Second, all members of the panel rejected petitioner's contention that disclosures by Center could have violated his Sixth Amendment right to the assistance of counsel, noting that Center had not represented petitioner in his criminal case. Pet. App. 7; *id.* at 10 (Will, J., concurring and dissenting).

Finally, all members of the panel concluded that use of documents disclosed by Center might have violated petitioner's Fifth Amendment right to due process and for that reason the case had to be remanded. The majority opinion observed, however, that this due process claim had "*potential* merit, though no more." Pet. App. 7-8; see *id.* at 15-16 (Will, J., concurring and dissenting).

The court remanded for consideration of two factual questions presented by the due process claim: "first, whether the government procured or was otherwise complicit in a violation of the attorney-client privilege and, second, if so, whether the violation resulted in the introduction of evidence sufficiently material and adverse to [petitioner] that the failure to

exclude it denied him his basic procedural rights." Pet. App. 9. In addressing those questions, the majority stated, the district judge could "if she wishes conduct an initial *in camera* examination of the documents that the government obtained from Mark Center and of the transcript of his grand jury testimony before deciding whether an evidentiary hearing (at which materials submitted to the grand jury could be disclosed to the defense pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i) and (ii)) is necessary to resolve the issue." Pet. App. 9. Judge Will would have required the district court to conduct an evidentiary hearing. *Id.* at 16-18.

ARGUMENT

1. Petitioner contends (Pet. 5-9) that the majority erred in its determination that his appellate brief failed to preserve any claim based upon his privilege against compulsory self-incrimination.

The majority's decision not to address that question was amply justified. The sole reference to the privilege against self-incrimination in petitioner's court of appeals brief was in the last sentence of a footnote on the next to last page of the brief. After suggesting that any breach of petitioner's attorney-client privilege would have "serious Fifth and Sixth amendment implications," the footnote asserted that "the deliberate violation of an attorney-client privilege by the attorney also serves to deny a defendant his Fifth Amendment right against self-incrimination." Pet. App. 51 & n.4. There was no elaboration whatever on the basis for this claim, and the only authority cited was a "see generally" citation

to a 37-page section of a treatise addressing the "policy" of the attorney-client privilege.[2]

The legal basis for any self-incrimination claim that petitioner might have presented to the court of appeals is far from self-evident. In *Fisher* v. *United States*, 425 U.S. 391, 396 (1976), the Court made clear that a client's Fifth Amendment privilege does not in and of itself foreclose compelled production by an attorney of documents that have been provided by a client for purposes of obtaining legal advice.[3] Rather, the attorney-client privilege excuses the attorney from

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[2] C. Wright & K. Graham, *Federal Practice & Procedure* § 5472 (1986). The cited section of this treatise states that "[t]he privilege against self-incrimination is beyond the scope of this volume." *Id.* at 96. It refers to the Fifth Amendment privilege only in the course of a discussion of the attorney-client privilege's relation to other legal doctrines, saying, *inter alia*, that "[a]nother privilege whose operation is sometimes confused with the attorney-client privilege is the privilege against self-incrimination." *Id.* at 95. The treatise thus does not clarify the nature of any self-incrimination claim to which the footnote in petitioner's brief may have referred.

[3] The right against compulsory self-incrimination is a personal privilege that adheres to the accused individual, not to information that may incriminate him. *Couch* v. *United States*, 409 U.S. 322, 328 (1973). The Fifth Amendment protection "is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Fisher* v. *United States*, 425 U.S. 391, 397 (1976) (quoting *Perlman* v. *United States*, 247 U.S. 7, 15 (1918)). The Fifth Amendment "explicitly prohibits compelling an accused to bear witness 'against himself'; it necessarily does not proscribe incriminating statements elicited from another." *Couch* v. *United States*, 409 U.S. at 328. Petitioner was in no way compelled to be a witness against himself.

compelled production of documents or information he has received from a client, but only to the extent that the client could rely on the privilege against self-incrimination had the documents remained in his possession. *Id.* at 402-405. Inasmuch as Center cooperated with the government and was not compelled to produce any materials to the government, the application of these principles to this case is uncertain. Further, assuming for the moment that petitioner could have established that Center's voluntary production violated petitioner's privilege against self-incrimination, a task his appellate brief did not undertake, he would still have had to demonstrate how the violation could have entitled him to relief from his conviction. His brief was entirely silent on that question.

Under these circumstances, the court of appeals would have been required, in effect, to construct petitioner's unarticulated self-incrimination claim in order to address it. The court of appeals was justified in refusing to assume that burden. Petitioner was represented by experienced counsel. Rule 28(a)(4), Fed. R. App. P., requires an appellant to specify the issues on which he seeks review, and issues that are not properly presented will be deemed to have been waived. See *United States* v. *Williams*, 877 F.2d 516, 518-519 (7th Cir.), cert. denied, 110 S. Ct. 180 (1989); *United States* v. *Ballard*, 779 F.2d 287, 295 (5th Cir.) ("Notice pleading does not suffice for appellate briefs."), cert. denied, 475 U.S. 1109 (1986). The court did not err in its finding that petitioner had failed to preserve whatever self-incrimination claim, if any, might have been available to him.

Further, whatever the merits of petitioner's contentions, they do not warrant review at this stage of the

proceedings. A necessary, but not sufficient, predicate for any alleged violation of petitioner's right to due process or privilege against self-incrimination is a showing that Center violated petitioner's attorney-client privilege. The court of appeals has remanded for further proceedings on that question–*i.e.*, "whether the government procured or was otherwise complicit in a violation of the attorney client privilege." Pet. App. 9. Given the likelihood that the facts relevant to petitioner's claims will be clarified during the remand, further review of the court of appeals' interlocutory decision is not warranted. See *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967).

2. Petitioner also contends (Pet. 10-12) that the court of appeals erred in allowing the district court to review Center's grand jury testimony and documents that he provided to the government *in camera* before determining whether to conduct an evidentiary hearing.

Any challenge to the adequacy of the procedures that may be employed upon remand is premature. *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, *supra*. The court of appeals has not foreclosed an evidentiary hearing; it has only recognized the court's discretion to review grand jury materials and documents from the files of Center's former law firm *in camera* before determining whether such a hearing is necessary to resolve the questions remaining for decision. The practice of allowing courts to review grand jury materials and other potentially sensitive documents *in camera* is well established. There is no reason, we submit, why this Court should undertake the task of specifying the procedures that the district court should follow on remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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